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# In the Supreme Court of the United States

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**OCTOBER TERM, 1930.**

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**Number 1.**

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CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
*Plaintiff in Error,*

vs.

AUGUST E. HOLMBERG,
*Defendant in Error.*

—o—

**IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA**

—o—

## SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF IN ERROR

—o—

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On October 13, 1930, counsel for defendant in error served upon counsel for plaintiff in error a supplemental brief. This brief is in reply to the suggestions contained in that one, together with such additional suggestions as have occurred to us since the filing of our original briefs more than two years ago.

I.

Defendant in error suggests that we are foreclosed to make any complaint of the Nebraska Statute under consideration because, it is said, the Railroad Company invoked the protection of the statute by reciting in the answer before the Railway Commission that defendant in error had not tendered any part of the expense of the proposed underground crossing. We submit that this was a mere recital that Mr. Holmberg had not even tried to comply with the pretended statute but it in no manner is an invocation of the statute in protection of the plaintiff in error. The prayer of the answer before the Railway Commission (R. 4) is that the complaint of Mr. Holmberg "be dismissed." No other request was made of the State Railway Commission. In any event, the opinion of the State Supreme Court (115 Neb. 727, R. 108) considered that the constitutionality of the crossing statute was squarely presented to it in this case and decided it. We submit, therefore, that the record does not show any such reliance by plaintiff in error upon the challenged statute as to be a waiver of the right to claim its invalidity. Moreover, the fact that the validity of the statute was actually considered and decided by the State Court clearly brings this case within the express provisions of the Judicial Code authorizing this Court to review that decision.

II.

**WAY OF NECESSITY**

On page 2 of the Reply brief of plaintiff in error, we recite that counsel for defendant in error say at page 11 of their brief:

> "The statute of 1866 was based upon the common law as to ways of necessity."

That statement was correct when written. But after we served our reply brief upon counsel for defendant in error and on the day of the previous argument before this Court, they withdrew their original brief from which the above quotation was taken and substituted their present main brief from which the above quotation was omitted. We did not discover this change until after the oral argument was completed, but wish now to call attention to it. We submit that the admission above quoted was correct.

## III.

## FURTHER ILLUSTRATIONS OF THE POLICE POWER

*Chicago and Alton Railroad Company vs. Tranbarger,* 238 U. S. 67, relied upon by defendant in error at page 29 of their brief, upheld a statute which was designed to promote the public health by preventing the impounding of flood waters and stagnant waters along the railroad right of way by requiring the railroad company to establish suitable openings to drain such waters, this Court saying, page 76:

> "* * * The statute in question was passed under the police power of the state for the general benefit of the community at large and for the purposes of preventing unnecessary and wide spread injury to property."

Therefore, that case is not in point in the case at bar, there being no comparable situation presented.

## IV.

**A valid exercise of the police power requires a legislative declaration of duty by the railroad company designed to promote the public safety, health or welfare. The police power is not invoked when the performance of the act in question is left to accident or the petition or convenience of an individual as in the case at bar.**

Counsel for defendant in error at page 30 of their brief say concerning the crossing proposed:

> "It would also add to the safety of travelers and of operatives on the railroad."

But who is to decide that such travelers and operatives on the railroad are in need of protection by the building of an underground crossing for Mr. Holmberg? The statute makes no declaration of duty on the subject of thus protecting travelers. It merely leaves to the uncertain complaint of a private individual that some existing crossing "is not adequate or is unsafe and dangerous to the life and property *of those who use the same*," the question whether or not any such crossing shall ever be built. In other words, the language of the statute in every reference to safety refers to the safety "*of those who use the same*" and this expression clearly refers to persons crossing the railroad track. Since the whole subject of the statute deals with private farm crossings, this expression refers to private farmers and not to the general public. It seems obvious that if the legislature was concerned in this statute with the safety of passengers on the trains, or train operatives, it would have made its intention more definite than the uncertain filing of a petition by a private farmer who desired greater convenience in handling his livestock across the track.

Other statutes of Nebraska which are police regulations illustrate that in each instance there is a legislative finding or judgment pronounced in the statute imposing a duty to be performed for the public safety, health or welfare under appropriate penalties for disobedience. Thus:

*Fencing statute, Section* 5396 Comp. St. Neb., 1922, provides:

> "Every railroad corporation whose lines of road or any part thereof are open for use, and every railroad company formed or to be formed, but whose lines are not now open for use, *shall within six months* after the lines of such railroad or any part thereof are open, *erect and thereafter maintain fences on the sides of their right of way* * * *, with openings, gates or bars at all farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad. * * *"

Penalty, liability for stock injured or killed from failure to fence. Section 5397.

*Full Crew Bill, Section* 5336, says:

> "*It shall be unlawful* for any railroad company doing business in the State of Nebraska to operate or run over its road, etc. * * * any passenger, mail or express train carrying passengers * * * with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and one flagman, etc."

*Freight Crews, Section* 5337, says:

> "*It shall be unlawful* for any railroad doing business in Nebraska to operate or run over its road or any part thereof, etc. * * * any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor and one brakeman, etc."

There are certain exceptions to these requirements.

Penalty: Section 5339. The officers or agents of any railroad company violating the above sections "shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00, etc."

*Light Engine Crews, Section* 5341 says:

"*It shall be unlawful* for any railroad doing business in the State of Nebraska to operate or run over its road from one division to another, or to suffer or permit to be operated * * * any light engine which is not manned with a crew consisting of one engineer, one fireman and one conductor."

Penalty, Section 5343, provides a penalty of not less than $100.00 or more than $500.00 fine for violation.

*Waiting Rooms, Section* 5374, provides:

"Every railroad corporation shall keep open suitable waiting rooms" and provide suitable toilet facilities for passengers and require such waiting rooms to be heated and lighted.

*Penalty,* Section 5376 provides for a forfeiture of from one to five hundred dollars for violation.

The duty in the above illustrations is expressly and directly imposed by the legislature, thus amounting to a decision from the legislative department of the Government that the things specified are necessary to the public health, safety or welfare. This is the test of the police power. In each instance the power is exerted directly and in direct behalf of the public. Each illustration, therefore, contains the two essential elements, first, there must be a legislative decision or declaration that a particular act of protection or restraint be done, and second, the

protection declared necessary must be for the benefit of the public.

Compare these illustrations and principles involved in them with the law of 1923 relating to underground crossings for livestock in the case at bar. There, there is no legislative finding that underground crossings for livestock shall ever be built, nor are any conditions specified in the law which could amount to a legislative finding or judgment as to whether or not such structures would be necessary either for the protection of the public or private individuals. Such structures are not even in contemplation unless some private land owner such as Mr. Holmberg desires an underground crossing for his private convenience. Then he, not the legislature, initiates a proceeding before the Commission to ascertain whether he, a private citizen, and for his private convenience, may have such structure built partly, or entirely at railroad expense. The Railway Commission under the Act adjudicates, as a matter of private right and wholly without reference to any public need for the structure, whether the petitioner, Mr. Holmberg, shall have such structure not for any public purpose but for his private convenience. If the Commission decides in his favor then, under the Act, the Commission may order a railroad company to contribute the first $700.00 and 50% of the additional cost not for the public use but for the private use of the petitioner.

Thus, the statute, when tested by other recognized applications of the police power, fails to contain any of the elements which mark the proper exercise of that power, which are:

1. There must be a legislative finding or judgment of some measure for the protection or promotion of the public health, safety or welfare.

2. The means adopted must be in promotion of the public objects mentioned and never in promotion of purely private interests.

———o———

**NEBRASKA DECISIONS HERETOFORE RENDERED WOULD RESULT IN THE CROSSING STATUTE BEING HELD VOID.**

In *Welton vs. Dickens,* 38 Neb. 767, a statute was held void which attempted to authorize condemnation proceedings to enable any person whose lands were completely enclosed by lands of others to acquire a private roadway over such lands in order to reach a public highway. This situation is certainly analagous to the case at bar so far as the individual's rights are concerned, only the case at bar presents a less difficult situation for the individual because Holmberg has a public highway on two sides of his farm and the private road is desired simply to connect the different parts of the farm. Yet in the cited case the Supreme Court said: (Syllabus 1, 2, 3 & 6).

> "The constitutional provision, 'The property of no person shall be taken or damaged for public use without just compensation,' prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner.
>
> "Such constitutional provision forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just com-

pensation being made, the amount of which is to be assessed by a jury.

"The want of power in a legislature to transfer to one man the property of another without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature.

"Sections 47, 48, 49, 50, 51 and 52 of Chapter 78, Compiled Statutes, 1893, authorize the taking of private property for private use, the roads therein mentioned being essentially private and beyond the public control, and said sections are therefore unconstitutional and void."

In the opinion the Court lays down the test of what constitutes a public or a private use at pages 774-5, as follows:

"Now, is the use for which this statute authorizes the taking of appellee's land a public or private one? Is the purpose of this law to take A's property and transfer it to B for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public, the law is good; if, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void; and, whether one or the other, is a question of law. To make the use public, it need not be for the benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate. (Coster v. Tide Water Co., 18 N. J. Eq., 54)."

Similar reasoning was employed by the Nebraska Court in *Vetter vs. Broadhurst,* 100 Neb. 356. In that case, an irrigation statute of Nebraska attempted to authorize "every person, corporation or association intending to construct and maintain a storage reservoir for irrigation or any other useful purpose * * *" to take land by eminent domain for the purpose of such reservoir site. Under that, an individual who owned a farm through which a creek ran attempted to take five acres of the land of the upper proprietor along the stream, claiming that it was necessary to take such portion of his neighbor's farm in order to build the reservoir site. The Nebraska Court construed the statute in so far as it was claimed it would authorize an individual to exercise the right of eminent domain for his private benefit, no other member of the public being involved, as invalid, and the decision makes the point that, page 362:

> "Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and *not to a particular individual.*"

Since Mr. Holmberg in the case at bar by proceedings before the Railway Commission seeks to take a private road across the railway right of way for his private convenience and there is to be no common use of the land by even a limited number of the public, the procedure falls under the condemnation of the cited cases.

So that, under the well-reasoned doctrine of previous decisions from the Nebraska Supreme Court, Mr. Holm-

berg's intended right fails and the error of the Nebraska Court's opinion in the case at bar is made manifest.

Respectfully submitted,

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